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No. 05-1342

In the
Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Financial and Insurance Services,
Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF CHARLES W. TURNBAUGH, COMMISSIONER OF FINANCIAL REGULATION FOR THE STATE OF MARYLAND, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER LINDA A. WATTERS

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Steven M. Sullivan
Solicitor General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202

Jonathan R. Krasnoff
Thomas L. Gounaris
Christopher J. Young
Assistant Attorneys General
500 North Calvert Street,
Suite 406
Baltimore, Maryland 21202
(410) 230-6123

Keith R. Fisher*
Special Assistant
Attorney General for the
State of Maryland
Michigan State University
College of Law
334 Law College Building
East Lansing, Michigan 48824
(517) 432-6974

* *Counsel of Record*

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INTEREST OF *AMICI CURIAE*

Amicus Charles W. Turnbaugh is the Commissioner of Financial Regulation for the State of Maryland, the state official responsible for supervision and regulation of a wide range of financial services providers doing business within the State of Maryland, including state-chartered banks and nonbank mortgage lenders.[1] *Amicus* American Association of Residential Mortgage Regulators ("AARMR") is an umbrella organization of state officials charged with the administration of state laws regulating residential mortgage lending, servicing, and brokering. AARMR is concerned that its members nationwide will no longer be able to exercise jurisdiction over state-chartered corporations engaged in the mortgage banking business if the decision of the court below and other similar rulings are allowed to stand.

Early in 2004, the Office of the Comptroller of the Currency (the "OCC") announced sweeping preemption of state laws as applied not just to national banks but to their state-chartered operating subsidiaries as well.[2] Since then, *amici* have been faced not only with blatant disregard of state laws by

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[1] Letters of consent by the parties to the submission of this brief have been filed with the Clerk's office. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] These "OCC Regulations" include Office of the Comptroller of the Currency, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 7, 2004) (codified at 12 C.F.R. pts. 7, 34); Office of the Comptroller of the Currency, Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 7, 2004) (codified at 12 C.F.R. § 7.4000).

these state-chartered lenders but also with orchestrated litigation efforts intended to establish judicial approbation of the OCC Regulations and enjoin attempts by state officials to enforce state law. Just as the Sixth Circuit has done in this case, the United States Court of Appeals for the Fourth Circuit recently accorded deference to the OCC Regulations and affirmed the issuance of an injunction frustrating the ability of state officials to investigate consumer complaints or otherwise enforce Maryland's mortgage lending laws with respect to state-chartered operating subsidiaries of a national bank. *National City Bank of Indiana v. Turnbaugh*, ___ F.3d ___, 2006 WL 2294843 (4th Cir., Aug. 10, 2006). That action was commenced by National City Bank after Maryland consumers had filed complaints alleging that its operating subsidiaries had violated state limitations on prepayment penalties in adjustable rate mortgages.

The Fourth Circuit decision, together with the decision of the Sixth Circuit below and others in the Second and Ninth Circuits,[3] are of enormous concern to *amici* because they, like the OCC regulations giving rise to them, vitiate federalism principles that have constituted the bedrock of our systems of financial regulation and corporate governance. Moreover, these developments represent an alarming encroachment upon sovereign state interests, which are protected by the Tenth Amendment to the United States Constitution.[4] Left unchecked, these regulations and court decisions will eradicate well-established legal distinctions between national banks and

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[3] *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. filed*, No. 05-431 (U.S. Sept. 30, 2005).

[4] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

their subsidiaries and eviscerate the states' authority to regulate hundreds of state-chartered, nonbank financial services providers.

INTRODUCTION

This *amici curiae* brief will primarily address the second question presented in the petition: Do the OCC Regulations, by equating a state-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of state regulation, violate the Tenth Amendment to the United States Constitution?

The court of appeals held that the OCC Regulations preempted various provisions of Michigan law and did not violate the Tenth Amendment to the United States Constitution. *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005). As identified by the court below, the focus of Michigan's argument is 12 C.F.R. § 7.4006, the OCC's operating subsidiary rule.

Since their inception in the 1960's, operating subsidiaries of national banks have always been subject to regulation by the states. This case, like others around the country, has arisen from an unprecedented assertion of preemptive authority by the OCC, at the expense of state sovereignty and the well-being of the banking public, in an industry that this Court has recognized to be "of *profound local concern*," both "as a matter of history and as a matter of present commercial reality. . . ." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980) (emphasis added). The regulation in question, 12 C.F.R. § 7.4006, articulates a preemption rule for these state-chartered operating subsidiaries that is coextensive with regulations applicable to the parent national bank,[5]

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[5] 12 C.F.R. § 7.4006 provides: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that

including 12 C.F.R. §§ 7.4000 (visitorial powers), 7.4008 (non-real estate lending), 7.4009 (applicability of state law to national bank operations), and 34.4 (applicability of state law to real estate lending). This brief will refer to these regulations collectively as the "OCC Regulations."

Together, the OCC Regulations effectively give not merely national banks but also their operating subsidiaries *carte blanche* to ignore state laws they find inconvenient. If these regulations continue to be upheld, large banking organizations will be in a position to have their cake and eat it too, at the expense of the states and the consumers who are protected by state banking laws. Here, for example, Respondent Wachovia Bank wishes to (1) enjoy the insulation from liability for Respondent Wachovia Mortgage's acts or omissions that is provided by the doctrine of corporate separateness, and (2) simultaneously ignore that separate corporate existence and treat the subsidiary mortgage company as though it were a department of the bank itself for purposes of avoiding compliance with state law. This contradiction defies both logic and well over a century of settled law.

Yet the OCC has been remarkably successful with a national litigation strategy of appearing in the lower federal courts around the country, either as a party or as *amicus curiae*, and persuading them to accord undue deference in misplaced reliance upon this Court's decision in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and to disregard nearly 150 years of history in our dual banking system. That campaign has resulted in court rulings, including the one below, which subvert several cornerstone legal principles, most notably those of corporate separateness,[6] the

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those laws apply to the parent national bank."

[6] *See, e.g., Dole Food Corp. v. Patrickson*, 538 U.S. 468, 474 (2003); *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998).

primacy of state corporation law,[7] and the presumption against preemption.[8]

Operating subsidiaries were conceived as vehicles for separating particular business activities and their attendant risks from the business conducted by the parent bank. When the OCC originated the idea during the mid-1960's, the Federal Reserve objected on the grounds that no provision of the National Bank Act authorizes such subsidiaries, and, in the absence of such an independent authorization, 12 U.S.C. § 24 (Seventh) actually forbids a national bank from owning stock for its own account, a prohibition that manifestly eliminates the possibility of owning a subsidiary. Ultimately, the OCC reached agreement with the Federal Reserve, on the condition that these "op. subs" would be forbidden from engaging in any activity other than those that could be done by the bank and at only those locations where the bank could do them, thereby preventing evasion by the parent bank of state branching restrictions. The OCC stands this entire concept on its head by recharacterizing that same activities/same locations condition as establishing legal equivalence between the parent bank and its subsidiary, even though the latter does not (and cannot) have a national bank charter; is in fact chartered by an entirely different sovereign; and has no eligibility for membership in the Federal Reserve System, no legal authority to fund its activities by accepting deposits from the public, and no entitlement to

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[7] *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 85-86 (1987); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Oregon Ry. & Navigation Co. v. Oregonian Ry. Co.*, 130 U.S. 1, 20 (1889); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944).

[8] *See, e.g., Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 339 (2005); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

federal deposit insurance.

The arguments now embraced by the OCC depart dramatically from its own historic interpretation of the national banking laws. Not until 2001 did the OCC even claim to have exclusive preemptive authority over operating subsidiaries. 66 Fed. Reg. 34,784, 34,788 (2001). Only ten years earlier, the OCC had no qualms about abandoning the same activities/same locations characteristic that now forms the linchpin of its preemption position on operating subsidiaries. Emboldened by its victory in *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), involving a national bank that had used an operating subsidiary to sell annuities, the OCC promulgated a revised operating subsidiary regulation, which contemplated authorizing such subsidiaries to engage in activities that were *not* permissible for the parent national bank. *See* Office of the Comptroller of the Currency, Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342 (Nov. 26, 1996). Thus, for purposes of determining whether and to what extent deference is owed to the administrative agency, the OCC's recent insistence that there is no legal distinction between national banks and their operating subsidiaries can scarcely be considered either longstanding or consistent. Furthermore, the OCC rescinded that 1996 regulation in 2000 after having been rebuked by Congress for allowing operating subsidiaries to conduct activities not authorized for their parent banks. 65 Fed. Reg. 12,905, 12,909 (2000).

Of fundamental importance to this case is the absence of any provision in the National Bank Act authorizing the OCC's encroachment into these traditional areas of state authority. Indeed, from the creation of the national banking system, the prevailing characteristic of our dual banking system has been concurrent federal and state regulation. Whereas the National Bank Act contains only one provision that expressly preempts state law, 12 U.S.C. § 85, several provisions of the Act require the OCC to defer to and abide by the policy choice

made by state law, *see, e.g.*, 12 U.S.C. §§ 36, 92a, 214c, while its overall structure and tone contemplate the coexistence of the laws of the state and federal sovereigns, as the OCC's own regulations have recognized. *See* 12 C.F.R. § 7.2000(b) (permitting national banks, where not inconsistent with federal banking laws and regulations, to choose corporate governance procedures from a menu of state corporate law options). Under this scheme, federally chartered banks have *always* been subject to various state laws. Over a century of consistent case law supports this view.[9] These tenets are fundamental to the notions of comity that underlie "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). If these principles apply to national banks themselves, then *a fortiori* state laws must also apply to their state-chartered operating subsidiaries.

One of the most troubling aspects of this case is that the mischief wrought by the OCC's preemption campaign could extend beyond national banks and their operating subsidiaries. In 2005, the Financial Services Roundtable, a trade organization of leading banking and other financial services organizations, filed with the FDIC a petition seeking the exercise by that agency of preemptive authority so as to give state-chartered banks comparable immunity from state consumer protection laws to what their national bank brethren enjoy as a result of the OCC's Regulations. The FDIC held a public hearing on this proposal and thereafter issued for notice and comment a proposed rulemaking on the requested

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[9] *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 244-54 (1944); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924); *McClellan v. Chipman*, 164 U.S. 347, 359 (1896); *National Bank v. Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870).

preemptive action.[10] If the FDIC were to promulgate a valid preemptive rule, then state authority over banking, mortgage banking, and consumer protection would be further devitalized.

If federal banking regulators were allowed to continue down this path of increasingly sweeping preemption of state laws governing various state-chartered entities, very few nonbank and nonbank-affiliated lenders would remain subject to state law. Even those few might be able to evade state regulation by availing themselves of a practice known as "charter renting."[11] One federal court recently upheld such an arrangement under the very same rationale used by the court below. *See, e.g., SPGGC, LLC v. Ayotte*, ___ F. Supp.2d ___, 2006 WL 2165672 (D.N.H. Aug. 1, 2006) (National Bank Act

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[10] *See* Federal Deposit Insurance Corporation, Petition for Rulemaking to Preempt Certain State Laws: Notice of Public Hearing, 70 Fed. Reg. 13,413 (Mar. 21, 2005); *id.* at 13,417 (reproducing text of Mar. 4, 2005 Financial Services Roundtable petition); Federal Deposit Insurance Corporation, Interstate Banking; Federal Interest Rate Authority: Notice of Proposed Rulemaking, 70 Fed. Reg. 60,019 (Oct. 14, 2005).

[11] Charter renting is a contractual arrangement between a nonbank lender and a depository institution (often a national bank) located in a state with no usury limits for consumer loans. By "renting" out its charter to the nonbank lender, the national bank effectively exports unregulated interest rates from the state in which it is located to the borrower's home state, whose usury laws have been expressly preempted by *Congress* under 12 U.S.C. § 85, rather than by unilateral action of an administrative agency. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003). The nonbank indemnifies the bank whose charter it is renting, and the bank underwrites the loans; the nonbank acts as loan originator and collection agent, and the two institutions share in the profits.

preempted limitations that New Hampshire Consumer Protection Act would have imposed on fee structure of stored value gift cards promoted and sold by bank's "agent").

Thus *amici*, like the Petitioner and other similarly situated state officials, face an unprecedented array of federal administrative incursions into traditional areas of state sovereignty protected by the Tenth Amendment. In a mere two sentences, however, the court below dismissively rejected the state's Tenth Amendment claim, without analysis. The court of appeals evidently viewed the Tenth Amendment as mere surplusage – as little more than a tautology -- rather than a constitutional provision that was hotly debated by the Federalists and the Anti-Federalists and then placed by them, with great deliberation, at the conclusion of the Bill of Rights. The court of appeals concluded -- somewhat facilely, as have several other courts -- that because banking is commerce, which falls within Congress' Article I powers, there is no Tenth Amendment interest of the states to protect. That conclusion encompasses two profound errors: (1) that there is no substantive content to the Tenth Amendment, and (2) that the preemption taking place here was an exercise by Congress of its commerce power, as opposed to an unauthorized arrogation of power by an administrative agency acting without the direction of Congress.

This case presents an opportunity for the Court to clarify the scope of the Tenth Amendment, particularly as applied to exercises of preemptive authority by federal administrative agencies, in order to accord state laws the full measure of protection guaranteed by the Constitution.

SUMMARY OF THE ARGUMENT

Adopted by the Framers as a bulwark against federal encroachment upon state sovereignty and individual rights, the Tenth Amendment requires that whatever governmental authority is neither delegated by the Constitution to the federal

government "nor prohibited by it to the States" must be "reserved to the States respectively, or to the People." In holding that the Tenth Amendment is not violated by regulations of the Comptroller of the Currency purporting to preempt state laws, as applied not only to national banks but to their state-chartered operating subsidiaries, the court of appeals erred for three reasons:

1. States' authority over corporations chartered under state corporation laws and states' regulation of foreign corporations doing business within their borders are fundamental aspects of state sovereignty. So too is the police power of the state exercised for the protection of its citizens against abusive mortgage lending and other predatory lending practices. The Tenth Amendment constitutes a bar against federal agency efforts to preempt these sovereign attributes where, as here, the administrative preemption is undertaken in the absence of "explicitly conferred" statutory authority, *Hopkins Fed. Sav. & Loan v. Cleary*, 296 U.S. 315, 336-37 (1935), or other clear manifestation of congressional intent to preempt. Here, far from acting pursuant to any such authority, the OCC preempted a broad array of state laws even in the face of longstanding and oft-repeated congressional support for state regulation of consumer protection and fair lending.

2. The presumption against preemption articulated by this Court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and its progeny admonishes courts against finding that historic state police powers have been superseded "unless that was the clear and manifest purpose of Congress." Under proper application of the Tenth Amendment, this presumption against preemption of state laws warrants heightened emphasis in cases of purported preemption by a federal agency. Absent clear congressional authorization, such administrative preemption takes place outside the political process safeguards of federalism, which this Court identified in *Garcia v. San Antonio*

Metropolitan Transit Authority, 469 U.S. 528 (1987), as the primary source of the states' Tenth Amendment protection. Fundamental to those political process safeguards is political accountability to the electorate, which is present when Congress and the President together enact laws but absent when federal agencies make law by rulemaking. Especially in light of this Court's insistence that Congress provide a "clear statement" to overcome the presumption against preemption, *Gregory v. Ashcroft*, 501 U.S. 452, 460-464 (1991), the political process safeguards that give meaning to the Tenth Amendment demand unmistakably clear evidence of congressional authorization before agency preemption can be upheld. No such evidence exists in the case of the OCC Regulations at issue here. Indeed, far from expressly or impliedly conferring preemptive authority upon the OCC, Congress has repeatedly indicated its desire that state regulation of mortgage lending and other areas continue undisturbed.

3. *Garcia's* political process safeguards inform the interpretation of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, pursuant to which only three categories of federal law constitute the "Supreme Law of the Land." Agency rulemaking is not among them. Not designed to represent the interests of the states *qua* states, and unfettered by the requirements of bicameralism and presentment that this Court has insisted be observed for statutes to qualify as "Laws of the United States" within the meaning of the Supremacy Clause, federal agencies may not enjoy preemptive authority for their regulations except in two circumstances: (i) Congress, in compliance with the requirements of Article I, Section 7, has expressly delegated preemptive authority to the agency, or (ii) in compliance with those same requirements, Congress has enacted an expressly or impliedly preemptive statute that the agency is merely interpreting. The OCC Regulations at issue here do not meet either of those requirements. Hence, they do not preempt state law.

ARGUMENT

I. THE TENTH AMENDMENT BARS ADMINISTRATIVE PREEMPTION WHERE A FEDERAL AGENCY ACTS WITHOUT EXPRESS STATUTORY AUTHORITY OR OTHER CLEAR MANIFESTATION OF CONGRESSIONAL INTENT TO PREEMPT.

The court of appeals erred in holding that the Tenth Amendment does not bar the OCC Regulations from preempting Michigan's laws governing mortgage lending subsidiaries of national banks. The entirety of the Sixth Circuit's reasoning reads as follows: "We agree with the district court that *Congress assumed the authority to regulate national banks* under the Commerce Clause. The Tenth Amendment, reserving to the states those rights and powers not enumerated, is therefore not implicated by the National Bank Act or lawfully promulgated regulations thereunder." *Watters*, 431 F.3d at 563 (emphasis supplied).

Yet even that curt conclusion is enough to reveal the Sixth Circuit's fundamental error. Unlike preemption by *Congress*, the preemption here was done by an agency's naked assertion of authority in the absence of any express statutory authority or other clear manifestation of congressional intent. On the contrary, the OCC acted in the face of well-known congressional opposition to expanding the agency's authority at the expense of state banking regulation. *See, e.g.*, H.R. REP. NO. 103-651, at 53 (Conf. Rep.) (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (noting states' "legitimate interest in protecting the rights of their consumers, businesses, and communities" and disclaiming any congressional intent "to alter this balance and thereby weaken States' authority").

The durability of our constitutional system owes much to the ingenious and innovative federalism of the Framers'

constitutional design, which has been called "the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citing Henry J. Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019 (1977)). By insisting upon the creation and maintenance of multiple centers of concurrent power as an indispensable constitutional object, their design guarantees citizens "two political capacities, one state and one federal, each protected from incursion by the other." *Printz v. United States*, 521 U.S. 898, 920 (1997) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). This legal system is "unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.* Thus, our federalism ensures distribution of empowerment through a system that contemplates and invigorates alternative governmental actors that can, on behalf of the people, solve important social problems.

Federal intervention into the domain of commercial activities traditionally regulated by the states calls into question one of the "oldest questions of Constitutional law," *New York v. United States*, 505 U.S. 144, 149 (1992) -- namely, the appropriate spheres of sovereign authority of the federal and state governments and the proper relationship between them in our constitutional scheme. The Tenth Amendment is a key element in that design.

Placed by the Framers at the end of the Bill of Rights, the Tenth Amendment serves a very lawyerly drafting function: It negates any *expressio unius est exclusio alterius* construction by making the list of proscriptions in the Bill of Rights exemplary rather than inclusive, and vouchsafes to the States and to the people all powers that have neither been explicitly

conferred upon Congress nor proscribed to the States.[12] Thus, rather than being a grant of individual rights and liberties by positive law, the Bill of Rights establishes a structure whereby federal abridgment of those rights and liberties is interdicted, thereby giving to the States the *primary*, though not necessarily exclusive, role in protection and vindication of those rights.

The tautological approach of the Sixth Circuit and other courts simply avoids the difficult task of identifying and balancing the interests of the federal and state sovereigns. This Court should redress the necessary constitutional balance by identifying some of the substantive content of the sphere of state sovereignty protected by the Tenth Amendment and clarifying the proper role of federal administrative agencies in making preemption determinations that directly affect that sphere.

At the heart of this case are national bank operating subsidiaries, which are not federal instrumentalities but state-chartered nonbank corporations. The primary regulator of any corporate entity is its chartering authority. For federally chartered depository institutions, such as national banks, that

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[12] None of the first ten amendments positively confers individual rights and liberties upon the people. Rather, they assert prohibitions against federal trammeling of those rights and liberties and provide some specificity as to what those limitations on the federal legislative power are, beyond the prohibitions articulated in the body of the Constitution, *e.g.*, against bills of attainder, ex post facto laws, conferring title of nobility, suspending the writ of habeas corpus, and disproportionate taxation. U.S. CONST. art. I, § 9. The other side of the coin consists of those provisions protecting the preserve of the national government by prescribing limitations on the powers of the States, *e.g.*, proscriptions against States entering into treaties, alliances, or confederations, coining money, granting letters of marque, and passing their own bills of attainder or ex post facto laws. U.S. CONST. art. I, § 10.

entity is the United States, but that is not the case for all of the nonbank affiliates of those institutions, including their parent holding companies, their sister holding company subsidiaries, and their own operating subsidiaries. For them, the chartering authority is a sovereign state, just as it is for state-chartered banks. That state, which brings such institutions into existence, has a legitimate and compelling interest in preserving that existence in the current competitive realities of the financial services industry and in ensuring that those institutions serve the purposes for which they have been created. Other states in which they do business as foreign corporations have an equally compelling interest in regulating the commercial activities of those entities.

For approximately seventy years, it has been recognized that undue federal interference with this principle of comity is a violation of the Tenth Amendment. *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937); *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935). As Justice Cardozo observed in his opinion for the *Hopkins Federal* Court:

> A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. . . . This is true of building and loan associations in Wisconsin and in other states. They have been given corporate capacity in the belief that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi public instruments. . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are

> matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power *explicitly conferred.*

Id. at 336-37 (citations omitted) (emphasis added). *Hopkins Federal* invalidated an *act of Congress* as just such an unconstitutional infringement of state sovereignty. This case involves comparable action by the OCC, but without any legitimating buttress of congressional support, much less an "explicitly conferred" statutory authority.

Thus, in the case of the OCC Regulations at issue, where federal intrusion into the domain of state regulation is undertaken by an agency not only in the absence of authority "explicitly conferred" by Congress, *Id.* at 337, but even in the face of clear congressional intent that such authority *not* be conferred, then both state sovereignty and Tenth Amendment principles are violated and the agency's assertion of preemption must be deemed invalid.

Furthermore, the significance of the dual system of regulation in the evolution of the financial services industry in the United States can scarcely be overstated. It epitomizes a system in which the empowerment of multiple governmental actors has occasioned significant societal benefits by promoting competition among various sectors of the financial services industries, facilitating diversification by banking organizations, and protecting the public against unscrupulous lending practices. As found by a White House task group, "state participation in the chartering and regulation of financial institutions can genuinely be regarded as one of the finest examples of cooperative federalism in the nation's history. Because the balance of state and federal regulatory participation helps promote the public interest in a safe and competitive financial system, the dual system of chartering financial institutions should be maintained and strengthened wherever

possible." *Bush Task Group Report on Regulation of Financial Services: Blueprint for Reform (Part 1): Hearings Before a Subcomm. of the House Com. on Gov't Operations*, 99th Cong., 43-44, 46 (1984), *reprinted in* Fed. Banking L. Rep. (CCH) No. 150, Part II (Nov. 16, 1984). In that regard, the states have historically been responsible for a variety of innovations which are now commonplace, such as branch banking, real estate lending, trust department operations, and checking and other transaction accounts. Even interstate banking, which has been indispensable to the growth of megabanks such as Respondent Wachovia, was a state innovation.[13] Thus, as in Justice Brandeis's oft-quoted dictum, the states truly have served as laboratories for trying "novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

These important interests reside at the core of what the Tenth Amendment protects.[14] Proper respect for Tenth Amendment principles would allow the State of Michigan to regulate state-chartered mortgage companies, such as Respondent Wachovia Mortgage; it would also allow the State of Maryland to restrict excessive prepayment fees on adjustable rate mortgages through the statutes enjoined in *National City Bank v. Turnbaugh*.

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[13] *See Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985) (upholding regional interstate compact allowing reciprocal interstate banking against commerce clause, compact clause, and equal protection challenges).

[14] *Cf. EEOC v. Wyoming*, 460 U.S. 226, 264 (1983) (Burger, C.J., with Powell, Rehnquist, and O'Connor, JJ., dissenting) (expressly linking Tenth Amendment values with Justice Brandeis's "states as laboratories" concept); *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., with Burger, C.J. and Rehnquist, J., dissenting) (linking discussion of Tenth Amendment federalism values to state laboratory function).

For its part, Congress is well aware that the dual banking system serves as an important source of innovation and progress. Congress has consistently sought to preserve it, as is clear from Section 7 of the Bank Holding Company Act[15] and from the revolutionary interstate banking legislation of the 1990's, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) (hereinafter "IBBEA"). Indeed, it is particularly anomalous for Respondents and the OCC to argue, as they have below and in several other courts, that preemption is either necessary or appropriate, given Congress' longstanding and oft-repeated expressions of support for the continued vitality of state banking regulation. In the IBBEA, for example, Congress adhered to its unwavering policy of maintaining the balance of federal and state law under the dual banking system by ensuring that the application of state laws to national banks in the ordinary course of business is an essential element of that policy. It was effectuated by subjecting interstate branches of large, multi-state national banks, such as Respondent Wachovia Bank, to the laws of their host states in four comprehensive categories: community reinvestment, consumer protection, fair lending, and intrastate branching. 12 U.S.C. § 36(f).[16] Since

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15 "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846. A comment in the Senate Report underscores the point: "It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks . . . ." S. REP. NO. 1095, 84th Cong. 2d Sess., pt. 2, at 5 (1956).

16 The Conference Report expressly noted the States' "legitimate interest in protecting the rights of their consumers, businesses, and communities," and insisted that "Congress does not intend that the [IBBEA] alter this balance and thereby

that is the law for national banks themselves, it is difficult to see how OCC and Respondents can justify more favorable treatment for operating subsidiaries, even under their own approach of cloaking the state-chartered subsidiaries in the garb of national banks.

The OCC's Regulations stand athwart this longstanding congressional policy of preserving the dual banking system. Attempting to "federalize" what state-chartered operating subsidiaries can lawfully do is just the sort of unconstitutional infringement of state sovereignty that this Court invalidated in *Hopkins Federal*. Without any legitimating manifestation of congressional support, much less an "explicitly conferred" statutory authority, the OCC's assertion of preemption violates the Tenth Amendment.

II. IN CASES INVOLVING AGENCY PREEMPTION, THE TENTH AMENDMENT ELEVATES THE PRESUMPTION AGAINST PREEMPTION TO REQUIRE UNMISTAKABLY CLEAR EVIDENCE THAT CONGRESS HAS GIVEN THE AGENCY POWER TO PREEMPT.

The court below avoided the task of identifying and balancing the respective interests of federal and state sovereigns as they relate to regulation of one of the most common, basic, and necessarily *local* commercial transactions: obtaining a mortgage for one's home. Instead, the court of appeals, like the OCC, cut a broad swath through traditional areas of state sovereignty by ruling out concurrent state regulation. Such encroachment on state autonomy and self-governance directly

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weaken States' authority . . . ." H.R. REP. NO. 103-651, at 53 (Conf. Rep.) (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

implicates the core concerns of the Tenth Amendment. Those concerns are heightened where, as here, the political safeguards of federalism identified as essential by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1987), have been circumvented because preemption has been effected without congressional authorization.

The premise of *Garcia* and its vision of the Tenth Amendment relies upon the implicit protection of state interests via their political representation in Congress. *Id.* at 551-52. However, unlike Congress, federal agencies do not in any sense represent the states. Agency heads, such as the Comptroller of the Currency, are selected by the President, and agency staff are, by design, supposed to be disconnected from the political arena and serve as sources of technical expertise. *See generally* LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1981). As a federal administrative agency, the OCC is not accountable to the electorate; moreover, it is subject to institutional pressures that tend to make it more likely that state interests will be overlooked or undervalued. For example, the OCC largely subsists on fees paid by the institutions it regulates. The ability to generate agency revenues by collecting these fees creates incentives for the OCC to encourage more and more banking organizations to opt for the national charter. Those financial incentives make the agency's decision-making process susceptible to error and resistant to correction in ways that are not implicated when the decision-maker is an elected, representative body.

Precisely in order to prevent such results, this Court has long recognized a presumption against preemption in traditional areas of State regulation. "[W]e start with the assumption that the historic police powers of the states were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. *See also Dow Agrosciences*, 544 U.S. at 449; *Medtronic*, 518 U.S. at 485 (1996); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995);

CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 668 (1993). Among the presumption's antecedents is the venerable rule that "a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623 (1898). *See Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

The concerns animating and supporting the presumption against preemption are elevated by the Tenth Amendment when the preemption is effected not by Congress but by an administrative agency acting without congressional authorization. In such situations, the federal agency operates without the political accountability that is vital to this Court's application of the Tenth Amendment. For example, the Court has held that Congress cannot "commandeer the legislative processes of the States by compelling them to enact and enforce a regulatory program." *New York v. United States*, 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). If Congress were permitted to commandeer sovereign state resources to accomplish federal goals, "the accountability of both state and federal officials [would be] diminished." *New York*, 505 U.S. at 168. *See also Printz*, 521 U.S. at 920 ("The Constitution contemplates that a State's Government will represent and remain accountable to its own citizens.") (citing *New York*, 505 U.S. at 168-169; *Lopez*, 514 U.S. at 576 -577 (Kennedy, J., concurring)).[17]

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[17] Preemption, by ordering state legislatures *not* to regulate in an area clearly of interest to them, can be viewed as a form of "negative commandeering." *See* Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 27-28 (2000). If affirmative commandeering is unconstitutional, negative commandeering must be regarded as

The absence of the political accountability component demanded by the Tenth Amendment raises the bar considerably in agency preemption cases. Such administrative intrusions on traditional state authority will be given effect only when a statute's language makes the Court "absolutely certain that Congress intended" such a result. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

Thus, in order to enhance the safeguards of federalism, this Court has recognized, as a gloss on the presumption against preemption, an additional canon of interpretation requiring a *clear statement* from Congress. *Id.* at 460-461. Such a statement would constitute "unmistakably clear" evidence indispensable to ensuring that courts do not displace state law in the name of a command Congress did not actually enact into law. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (When "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."). *Accord, Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 541 (2002); *Gregory*, 501 U.S. at 460; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The court below simply disregarded the clear statement requirement. Instead, the Sixth Circuit announced that the presumption against preemption "disappears . . . in fields of regulation that have been

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at least problematic. Indeed, as Professor Tushnet explains, it may be worse: "Affirmative commandeering puts a new and undesired element on the legislative and executive agenda. Everything below it on the legislature's priority list shifts down a bit and, given limited time and political resources, some things drop off the list entirely. Notice, though, that the things that drop off the list are, necessarily, low-priority ones anyway. In contrast, negative commandeering can remove from the legislative and executive agenda the policy that constituents want more than anything else." *Id.* at 30.

substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Watters*, 431 F.3d at 560 n.3 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)). Actual history, however, directly contradicts the court of appeals' conclusion. Regulation of banking in this country was exclusively the domain of the states until creation of the national banking system during the Civil War. Since then, there has been both implicit and explicit congressional recognition and endorsement of the dual system of federally chartered and state-chartered banks coexisting in a competitive regulatory framework. Moreover, for the 35 years from 1966, when the OCC first officially introduced operating subsidiaries, until 2001, when it abruptly claimed exclusive preemptive authority over them, the states, and not the OCC, have consistently and efficaciously regulated these state-chartered nonbank entities.

The "clear statement" rule, so conspicuously absent from the decision below, necessitates the rejection of preemption here. In cases of agency preemption, the Tenth Amendment, in tandem with the presumption against preemption, must require unquestionable legislative clarity in order to ensure that Congress and the President, rather than politically unaccountable federal agencies, make the crucial decision to preempt state law. Agencies cannot simply stand in Congress' stead when questions of federalism are at stake. They are not designed to represent the interests of the states, and typically state interests are not part of the federal administrative calculus.

In this case, the OCC's assertion of preemption cannot be valid, because there is no clear expression of a congressional intent to preempt state banking laws. On the contrary, far from expressly conferring preemptive authority on the OCC, Congress has repeatedly indicated its desire that the states continue to regulate in areas such as consumer protection, fair lending, and banking in general.

The court below, and the other courts that have addressed OCC preemption, have muddied these waters by applying *Chevron* deference to the OCC's preemption assertion where no such deference was due. Rather than requiring a clear statement of intent to confer preemptive power upon the OCC, the Sixth Circuit was satisfied that, in its unduly limited view of banking law and history, nothing in the National Bank Act indicates that Congress expressly *disapproved* of the agency's preemption decision. That reasoning stands the presumption against preemption on its head. The court below inferred approval of preemption from congressional silence instead of insisting on a clear congressional indication of its intent to alter the federal-state balance, either by itself exercising the power to preempt, or by delegating the potential exercise of that power to the OCC. Such an inverted presumption obliterates the necessary political accountability and vitiates the states' ability to seek protection against encroachment on their authority through *Garcia*'s political process safeguards. The decision below is thus incompatible with the Tenth Amendment and can be reversed on this ground alone.

III. UNDER *GARCIA'S* POLITICAL PROCESS SAFEGUARDS APPROACH TO THE TENTH AMENDMENT, THE OCC REGULATIONS CANNOT QUALIFY AS THE SUPREME LAW OF THE LAND.

Preemption through agency regulations undermines the political process safeguards of federalism in another important way. The Framers, through the Supremacy Clause, authorized state law to be displaced solely by three specific types of federal law: the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. CONST. art. VI, cl. 2. Although there are many instances in which an agency's regulations can be

given preemptive effect, in such cases either the agency is simply interpreting a statute in which Congress itself has exercised preemptive power, *see, e.g., Smiley v. Citibank*, 517 U.S. 335 (1996), or else Congress is found to have expressly or impliedly delegated preemptive authority to the agency, *e.g., New York v. FCC*, 486 U.S. 57 (1988). "[A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Nor is the comprehensive nature of mere regulations adequate to confer preemptive effect. "To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

Thus, this Court's interpretation of the Supremacy Clause takes into account the same political process safeguards *Garcia* relied upon as the essence of what the Tenth Amendment protects. As noted above, that clause recognizes three categories of law as "the Supreme Law of the Land." Elsewhere in the Constitution, the Framers prescribed in detail procedures that were "finely wrought and exhaustively considered," *INS v. Chadha*, 462 U.S. 919, 951 (1983), to govern the adoption of each type of law recognized in the Supremacy Clause. Article V and Article VII establish precise procedures for adopting and amending the Constitution; Article II, Section 2 prescribes the procedures for making Treaties; and Article I, Section 7 sets forth the detailed procedures for adopting "Laws." The Framers deliberately made the adoption of each category difficult by requiring the assent of multiple participants, all of whom are subject to the political safeguards

of federalism.[18] By making federal law more difficult to adopt, and by giving to those federal institutions designed to serve state interests, such as the Senate, effective veto power over all three forms of potential "Law of the Land," these procedures protect the residual authority of the states and constitute the core of *Garcia's* political process safeguards.

While the Supremacy Clause's most commonly understood function is to declare the preeminence of the enumerated sources of federal law over any state law "to the Contrary," it carries with it a negative corollary as well: State law remains unaffected in the absence of something qualifying as the Supreme Law of the Land. As the OCC's Regulations do not so qualify, they cannot result in preemption. The political process protections of the Tenth Amendment demand nothing less.

Though it may seem an unlikely ally for those opposing preemption, the Supremacy Clause contains very specific and illuminating language about what the Framers intended. When it comes to "Laws of the United States which shall be made in Pursuance" of the Constitution, the only way these can be created is by strict compliance with the bicameralism and presentment requirements of Article I, Section 7. To remove ambiguity, and to prevent Congress from designating a potential "Law" as something other than a "Bill," the Framers

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[18] This was particularly true of the Senate, which is the common denominator for all three categories recognized by the Supremacy Clause and which, at the time the Constitution was ratified, was composed of individuals with especially strong ties to the states, given that Senators were directly appointed by the state legislatures. Adoption of the Seventeenth Amendment may have attenuated those ties by providing for election of Senators by popular vote, but it has not otherwise diminished the difficulties inherent in making or amending what the Supremacy Clause recognizes as the "Supreme Law of the Land."

included an additional clause which provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, *according to the Rules and Limitations prescribed in the Case of a Bill.*

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). The specificity and comprehensiveness of the procedures contemplated by this clause would lose much of their meaning if "Laws" capable of preempting state law could be made by other means or by other actors. Clause 3 therefore requires that Article I, Section 7 be regarded as prescribing the exclusive methodology for adopting "Laws of the United States."

This understanding of what is meant by the phrase "Laws of the United States" is confirmed by consistent usage of the operative word, "Laws," throughout the text of the Constitution:[19]

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[19] The historical evidence is also consistent with this understanding. Three mechanisms for resolving conflicts between federal and state law were introduced at the Constitutional Convention of 1787: (1) giving Congress power "to negative all Laws which they shd. Judge to be improper," James Madison, *Notes on the Constitutional Convention* (June 6, 1787) (quoting Charles Pinckney), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., 1911); (2) giving the Executive branch authority "to call forth the force of the Union [*i.e.*, use military force] agst. any member of the Union failing to fulfill its duty [to comply with federal law]," *id.* at 21 (Madison's notes of May 29, 1787); and (3) giving the judiciary power to treat acts of Congress as "the

- Art. I, § 4, cl. 1;
- Art. I, § 4, cl. 2;
- Art. I, § 6, cl. 1;
- Art. I, § 9, cl. 7;
- Art. II, § 2, cl. 2;
- Art. II, § 3;
- Art. III, § 2, cl. 1;
- Art. III, § 2, cl. 3; and
- Art. IV, § 1.

Each of these instances of the term "Law" (or its plural) manifestly refers to legislative action taken in accordance with the procedures mandated by Article I, Section 7.[20]

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supreme law of the respective States," *id.* at 245 (Madison's notes of June 15, 1787). The latter became our Supremacy Clause. The decision to designate therein only the "Constitution, . . . Laws . . . made in Pursuance thereof, and . . . Treaties" as "the Supreme Law of the Land" rendered them the exclusive methods capable of trumping state law, thereby eliminating the manifest dangers that would result from allowing federal agency officials to make random judgments about the propriety of state law.

[20] While the Constitution does also use the term occasionally to refer to common law (*e.g.*, "at Law or Equity" in Art. III, § 2, cl. 1) or to state law (*e.g.*, art. I, § 10, cl.1 prohibiting states from passing any "ex post facto Law, or Law impairing the Obligation of Contract"), taken in context these references do not call into question what is meant by usage of the term in connection with Laws to be passed by Congress and presented to the President. Obviously, the common law is not made "in Pursuance of" the Constitution, and to suggest that state Laws are treated by the Supremacy Clause as "the Supreme Law of the Land," would ignore the language of that Clause, which contrasts "Laws of any State" with "Laws of the United States . . . made in Pursuance [of the Constitution]."

Indeed, decisions of this Court have insisted that Congress must comply fully with the procedures prescribed in Article I, Section 7. For example, failure to adhere to those procedures has prompted this Court to strike down congressional efforts to permit legislative branch agents to exercise the legislative power without regard to bicameralism and presentment, and legislation giving the President power to cancel portions of a statute post-enactment. *See INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Clinton v. City of New York*, 524 U.S. 417 (1998).

The administrative lawmaking process is ill-suited to protecting the concerns of the Tenth Amendment and its procedural process safeguards. Unrestrained by the requirements of bicameralism and presentment, federal agencies can promulgate new provisions much more easily than Congress can enact statutes. Unlike Congress, agencies are not designed to and, in fact, do not represent the interests of the states *qua* states. The Framers' "finely wrought and exhaustively considered" lawmaking process, *Chadha*, 462 U.S. at 961, was designed, *inter alia*, to interpose a considerable impediment to federal encroachment on state prerogatives. If agency lawmaking by regulation could displace state law without express congressional authorization, a preemptive rule that could not command a legislative majority could nonetheless become federal law. Worse still, even if an overwhelming majority of both houses of Congress believed that such an agency preemptive rule would unduly trammel state authority, the onus would then be on *Congress* to overcome those same structural impediments in order to overrule the agency legislatively.

With regard, then, to agency preemption, the political process safeguards of the Tenth Amendment demand strict compliance with the language of the Supremacy Clause before agency regulations may be given preemptive effect. In turn, the

net effect of the language of the Supremacy Clause, read in context with the language and structure of the Constitution as a whole, is that no agency regulations can ever be "the Supreme Law of the Land" with preemptive effect *unless* Congress, in compliance with the requirements of Article I, Section 7, has expressly or impliedly delegated preemptive authority to the agency or has enacted an expressly preemptive statute that the agency is interpreting. Since the OCC Regulations before the Court do not meet those requirements, under the Tenth Amendment they cannot preempt state mortgage lending laws.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Keith R. Fisher*
Special Assistant
Attorney General for the
State of Maryland
Michigan State University
College of Law
334 Law College Building
East Lansing,
Michigan 48824
(517)432-6974

Steven M. Sullivan
Solicitor General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202

Jonathan R. Krasnoff
Thomas L. Gounaris
Christopher J. Young
Assistant Attorneys General
500 North Calvert Street,
Suite 406
Baltimore, Maryland 21202
(410) 230-6123

* *Counsel of Record*